

UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH DAKOTA
SOUTHERN DIVISION

CURTIS RONALD RABENBERG, Petitioner, vs. UNITED STATES OF AMERICA, Respondent.	4:21-CV-04015-KES ORDER ADOPTING REPORT AND RECOMMENDATION AND DENYING MOTION TO DISMISS
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Petitioner, Curtis Ronald Rabenberg, filed a motion under 28 U.S.C. § 2255 to vacate, set aside, or correct sentence by a person in federal custody. Docket 1. The court referred the motion to Magistrate Judge Veronica Duffy. The United States moved to dismiss the action for failure to state a claim. Docket 19. Rabenberg responded opposing the motion to dismiss. Docket 22. On August 23, 2021, Magistrate Judge Duffy submitted a report and recommended that the government's motion to dismiss be denied, that this matter be set for an evidentiary hearing, and that counsel be appointed to represent Rabenberg at the hearing. Docket 31. The government objects to the report and recommendation. Docket 35. Rabenberg responded to the government's objections. Docket 36. For the following reasons, the court adopts Magistrate Judge Duffy's report and recommendation in full.

FACTUAL BACKGROUND

A full factual background was provided by the magistrate judge in her report and recommendation. Docket 31 at 2-15. No objections were filed to the factual background, so it is adopted in full.

STANDARD OF REVIEW

The court's review of a magistrate judge's report and recommendation is governed by 28 U.S.C. § 636 and Rule 72 of the Federal Rules of Civil Procedure. The court reviews de novo any objections to the magistrate judge's recommendations as to dispositive matters that are timely made and specific. 28 U.S.C. § 636(b)(1)(B); Fed. R. Civ. P. 72(b). In conducting its de novo review, this court may then "accept, reject, or modify, in whole or in part, the findings or recommendations made by the magistrate judge." 28 U.S.C. § 636(b)(1)(C); *United States v. Craft*, 30 F.3d 1044, 1045 (8th Cir. 1994).

DISCUSSION

The United States contends that Rabenberg does not meet his burden to show ineffective assistance of counsel under *Strickland v. Washington*, 466 U.S. 668 (1984). The *Strickland* test requires a defendant to show (1) his counsel's performance was deficient and (2) the deficient performance resulted in prejudice to the defendant. *Id.* at 687. Viewed in the light most favorable to Rabenberg and as detailed in Magistrate Duffy's opinion, Rabenberg has alleged facts that meet both prongs.

The United States also alleges that a three-month reduction of sentence is not sufficient to show prejudice. The court finds that if one is in custody,

three months is a significant amount of time and is sufficient to show prejudice. Thus, the objections of the United States are overruled. The court has considered the case de novo and adopts the report and recommendation in full. This matter will be returned to Magistrate Judge Duffy for purposes of appointing counsel for Rabenberg and conducting an evidentiary hearing.

Thus, it is

ORDERED that the magistrate judge's report and recommendation (Docket 31) is adopted in full and respondent's motion to dismiss (Docket 19) is denied.

Dated December 30, 2021.

BY THE COURT:

/s/ Karen E. Schreier

KAREN E. SCHREIER
UNITED STATES DISTRICT JUDGE